

# **EC COMPETITION LAW IN THE TRAMP SHIPPING SECTOR**



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## 1. INTRODUCTION

### 1.1 Objective

The repeal of Regulation 4056/86<sup>1</sup> by Regulation 1419/2006<sup>2</sup> brought effectively tramp vessel services into the scope of EC competition rules. This long-standing exclusion of the tramp sector from the Community competition implementing rules was considered as an anomaly to the achievement of uniformity of the legal regime, since tramp services, together with cabotage, were the only remaining sectors to receive such a beneficial treatment. The need for a uniform competition law regime became urgent especially after the adoption of Regulation 1/2003,<sup>3</sup> with which a new decentralised system, by granting national competition authorities and national courts the power to apply Article 81 and 82 EC in their entirety, was established.

The expressed reasons for this immunity of the tramp services were related to the recognition of competitive elements inherent to the nature of the tramp sector resulting from the fact that rates for these services are freely negotiated on a case by case basis in accordance with supply and demand conditions.<sup>4</sup> Considering however that similar market conditions are present in other sectors as well, it appears that the exclusion of tramp services should be attributed mainly to political pressure by Member States with high interests in shipping (e.g. Denmark and Greece).

The new legal regime created consequently a certain degree of uncertainty to the industry, which was for a long time self-regulated. In order to assist the undertakings and the associations of undertakings operating tramp vessel services to assess whether their agreements are compatible with Article 81 EC, the European Commission issued the

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<sup>1</sup> Council Regulation (EEC) No 4056/86, OJ L 378, 31.12.1986, p. 4.

<sup>2</sup> Council Regulation (EC) No 1419/2006, OJ L 269, 28.9.2006, p. 1.

<sup>3</sup> Council Regulation (EC) No 1/2003, OJ L 1, 4.1.2003, p. 1.

<sup>4</sup> See 4<sup>th</sup> Recital of Regulation 4056/86.

“Guidelines on the application of Article 81 of the EC Treaty to maritime transport services”<sup>5</sup> (hereinafter the Maritime Guidelines).

The purpose of this paper is to examine how Article 81 EC could apply to the tramp shipping sector. Throughout this theoretical exercise, an attempt is being made to interpret and implement the competition law principles in the light of the common features of the sector. At each step, issues that require clarification will be addressed and discussed. More specifically, definition of the relevant market for competition law purposes can be proved to be a hard task in the case of tramp vessel services due to the structure of the tramp market; thus, an identification of the unique characteristics of the sector is necessary for a more accurate delineation of the relevant market. Furthermore, tramp shipping pools, the principal form of horizontal cooperation in the sector, will be assessed differently depending on where the centre of gravity of the pool agreement lies; hence, an analysis of the pool’s functions is required. In addition, any restrictive effects caused by the pool have to be balanced against possible contributions to social welfare. Summing up, this paper attempts to point out and deal with the key issues related to the determination of the relevant market and to the assessment of tramp shipping pools in the course of the application of Article 81 EC.

## 1.2 Structure

The analysis is divided into two major parts, one dealing with the definition of the relevant market (under 2. Tramp shipping market) and another assessing tramp shipping pools under Article 81 EC (under 3. Horizontal agreements in the tramp shipping sector under Article 81 EC).

The first part starts with defining what constitutes a tramp vessel service. The fact that a service amounts as a tramp vessel service is not anymore legally important. Nonetheless, a

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<sup>5</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, OJ C 245, 26.9.2008, p. 2.

reference to the definition is of relevance from a methodological point of view in order to limit the scope of this study. Afterwards, an account of the general characteristics of the tramp shipping market is provided. A description of those features is important for the comprehension of the structure and operation of the tramp sector, and thus, useful when defining the relevant market. Finally, the definition of the relevant market under competition law is discussed.

A description of tramp shipping pools is the starting point of the second, and more extensive, part. Taking into account that pool agreements are the primary form of horizontal cooperation in the tramp sector, an enumeration of their common features is necessary for the appraisal of their validity under Article 81 EC. Then, the assessment of pools under Article 81(1) is taking place. At this point, it is discussed under which circumstances pools would fall or not within the prohibition of Article 81(1) EC. Following this assessment, it is examined whether pools that infringe Article 81(1) EC may qualify for an exemption under Article 81(3). Therefore, a possible fulfillment by tramp pools of each of the four cumulative conditions laid down in Article 81(3) EC is discussed. Finally, it is considered if pool agreements could benefit from the Specialisation Block Exemption.<sup>6</sup>

### 1.3 Delimitation

Pools that are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) account as mergers and they are considered under Regulation 139/2004<sup>7</sup> on the control of concentrations between undertakings. Examination of such cases is beyond the scope of this paper.

Issues arising from the dominant position of undertakings operating in the tramp shipping market are a matter of discussion under Article 82 EC. As it was stated earlier, this paper deals only with Article 81 EC.

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<sup>6</sup> Commission Regulation (EC) No 2658/2000, OJ L 304, 5.12.2000, p. 3.

<sup>7</sup> Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2004, p.1.

Finally, it should be noted that the reader is required to be familiar with the commonly used terms in competition law. Such terms are not explained unless it is regarded necessary for the presentation of the topic.

## 2. TRAMP SHIPPING MARKET

### 2.1 The definition of tramp shipping services

As stated in the Maritime Guidelines,<sup>8</sup> the European Commission will adhere to the description provided in Article 1(3)(a) of Regulation (EEC) No 4056/86<sup>9</sup> when defining tramp vessel services. According to that definition a tramp vessel service means “*the transport of goods in bulk or in break-bulk in a vessel chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract for non-regularly scheduled or non-advertised sailings where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand*”.

The abovementioned definition consists of three operational elements, which all have to be fulfilled, and of a “competitiveness” assumption.<sup>10</sup> The method of shipment (“...*in bulk or break bulk...*”), the method of contracting (...*chartered wholly or partly to one or more shippers on the basis of a voyage or time charter or any other form of contract...*”) and the sailings’ characteristics (...*non-regularly scheduled or non-advertised...*) are basically a description of the traditional tramping services.<sup>11</sup>

It is questionable whether all these elements can be found in newer forms of maritime transport that are divergent from scheduled (liner) and non-scheduled (tramp) transport, as in the case of “*specialised transport*”, which has already been identified by the Commission in its decision regarding the Trans – Atlantic Agreement (hereinafter the *TAA* Decision).<sup>12</sup> In the *TAA* Decision, the Commission identified a series of characteristics

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<sup>8</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, OJ C 245, 26.9.2008, p. 2, para. 11.

<sup>9</sup> OJ L 378, 31.12.1986, p. 4.

<sup>10</sup> See Athanasiou, Lia I., Competition in liner and tramp maritime transport services: Uniform regulation, divergent application?, in Competition and Regulation in Shipping and Shipping Related Industries, Martinus Nijhoff Publishers, Leiden – Boston, 2009, p.72.

<sup>11</sup> Ibid, p. 72.

<sup>12</sup> OJ L 376, 31.12.1994, p. 1.



specific to specialised transport, like the semi-regular nature, the large volumes of homogeneous goods and the use of specialised vessels developed specifically to respond to the customer's needs,<sup>13</sup> which render it distinct from liner services and tramp vessel services. Therefore, the "... *the non-regularly scheduled...*" criterion of the definition could be problematic in its interpretation and as a consequence a thorough analysis of the specific service is required before the Commission can determine whether it constitutes tramp vessel service within the meaning of the Regulation.<sup>14</sup>

The "competitiveness" assumption ("*...where the freight rates are freely negotiated case by case in accordance with the conditions of supply and demand.*") contained in the definition is open to different elucidations.<sup>15</sup> First, it could be simply considered as an illustration of the reasoning behind the original exemption from the application of Reg. 4056/86 to the tramp shipping sector.<sup>16</sup> This alternative is supported also by the 4<sup>th</sup> Recital of Reg. 4056/86 which states: "*...it appears preferable to exclude tramp vessel services from the scope of this Regulation, rates for these services being freely negotiated on a case-by-case basis in accordance with supply and demand conditions;*". The second option, closer to the principle of narrow interpretation of the exceptions to the EC rules and supported by the majority of the commentators,<sup>17</sup> is to deem the "competitiveness" assumption as a condition for characterising a transport service as 'tramp vessel service' according to the definition of Reg. 4056/86. Therefore, not all tramp services fall within the definition. For example, such tramp services, where freight rates are not "*freely negotiated*" but predetermined based on an overall service agreement between shippers and tramp operators, should fall outside the definition of article 1(3)(a) of Reg. 4056/86.<sup>18</sup>

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<sup>13</sup> Ibid, paragraphs 47,48 and 49.

<sup>14</sup> European Commission, White Paper on the review of Regulation 4056/86, applying the EC competition rules to maritime transport, SEC (2004) 1254, Annex, Para 160, note 80.

<sup>15</sup> Blanco, L.O., Shipping Conferences under EC Antitrust Law, Criticism of a Legal Paradox, Hart Publishing, 2007, p. 170.

<sup>16</sup> Ersboll, N.S., The European Commission's Enforcement Powers: An Analysis of the Exclusion of Tramp Vessel Services From Regulation 4056/86 and Regulation 1/2003 [2003] ECLR 375, 381-382.

<sup>17</sup> See Athanasiou, Lia I., op. cit., p.73, Ersboll, N.S., op.cit., 381-382, Ruttley, Ph., International Shipping and EEC Competition Law [1991] ECLR 9, and Blanco, L.O., op. cit., p.171.

<sup>18</sup> Ruttley, Ph., op. cit., p. 8-9.

## 2.2 The definition of the relevant market

In the following paragraphs, an attempt is being made firstly to identify the general features of the tramp shipping market, then to present the different segments of the sector, and finally to define the relevant market under competition law. The general characteristics of the tramp sector are not legally important under the new regime since there is no exclusion from the implementation of the EC competition rules. However, comprehension of those characteristics can be useful when defining the relevant market under competition law, as well as for the understanding of the structure and operation of the sector.<sup>19</sup> The definition of the relevant product and geographic market is necessary when assessing a competition case. Its main purpose is to identify in a systematic way the competitive constraints faced by an undertaking.<sup>20</sup>

### 2.2.1 General features of the tramp shipping sector

#### *A. Highly competitive market.*

As explained under 2.1, the reason, behind the long-standing exclusion of the tramp sector from the application of EC competition rules to it, was mainly the acceptance that the conditions of competition are inherent to the way the tramp market operates. Perfect competition is an economic model that describes a hypothetical market form in which no producer or consumer has power in the market to influence price. The theoretical model of competition is governed by the law of supply and demand.<sup>21</sup> In order to affirm if the tramp market follows a nearly perfect competition model, as it is traditionally said, one has to examine whether the following four parameters are fulfilled: (i) atomicity, (ii) homogeneous product, (iii) transparency of information and (iv) equal access to the

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<sup>19</sup> Athanasiou, Lia I., op. cit., p. 75-76.

<sup>20</sup> European Commission, Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5.

<sup>21</sup> EU Report COMP/2006/D2/002 “Legal and Economic Analysis of Tramp Maritime Services”, prepared by Fearnley Consultants AS., 2007, para. 67.

market.<sup>22</sup> Failure to detect one of these four elements does not necessary imply a non-competitive market.

(i) *Atomicity*. Atomicity is the feature which describes the market that consists of a large number of small producers and customers, whose size is too small to influence the overall market. In the case of tramp market, producers are the shipowners/vessel operators and customers are the charterers.<sup>23</sup>

Various studies have shown that numerous undertakings, none of which are in position with their actions to influence the prices offered, operate in the tramp sector. More specifically, the figures provided by the study prepared by Clarkson<sup>24</sup> show that 4,795 companies own 26,280 vessels of the world's total merchant fleet, meaning an average of 5 vessels each, hence ownership is indeed highly dispersed.

Difficulties arise when trying to estimate the number of customers. Theoretically, there are several thousands potential customers if one bares in mind the parties involved in each transaction that requires transportation. For example, if the cargo is sold C&F (Cost and Freight), it is the seller, or his agent, who takes responsibility for the transportation. If, on the other hand, the cargo is sold FOB (Free On Board), responsibility for the transportation is on the buyer's, or on his agent's, part. Alternatively, an intermediary, a trader, might take care of the transportation, if the transaction is carried out through him. As a result, there are always at least three potential customers in each transaction.<sup>25</sup>

Therefore, it could be safely assumed that the requirements of the element of "atomicity" are met in the tramp shipping market.

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid., para 75.

<sup>24</sup> Clarkson Research Studies, *The Tramp Shipping Market*, April 2004, p.1.

<sup>25</sup> Fearnley's Report, "Legal and Economic Analysis of Tramp Maritime Services", op. cit., para 77.

(ii) *Homogeneous product*. Homogeneity means that goods and services are perfect substitutes; that is, there is no product differentiation.<sup>26</sup> In the tramp sector, homogeneity of the product is understood in the sense that all undertakings supply ship space for transport purposes. Practically, this similarity in the provided services can be found only in sector segments and not in the tramp as a whole. This is a normal outcome of the continuous adaptation of the sector in order to respond to the customers' needs. From a legal point of view, the notion of homogeneity is useful as part of the demand substitution test.<sup>27</sup>

(iii) *Transparency of information*. Transparency of information means that the prices offered are easily available to competitors and clients. Information systems in the tramp sector are very open. Information about revenues and asset prices are published daily and widely circulated in the industry to both shipowners and charterers by a variety of sources.<sup>28</sup> Thus, a high degree of transparency is ensured.<sup>29</sup>

(iv) *Equal access to the market*. Despite the possible barriers, i.e. the need for assets, the required time, management issues and in some cases technological expertise,<sup>30</sup> it is generally considered easy for a new player to enter the tramp market. More thorough consideration of this last parameter will be useful later when examining the criteria for definition of the relevant market under competition law, especially when looking at two of the main competitive constraints,<sup>31</sup> namely 'supply-side substitutability' and 'potential competition'.

This brief analysis explained why the tramp shipping sector is traditionally described as highly competitive. In addition, it partly justified the reasoning behind the exclusion from

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<sup>26</sup> Ibid., para 82.

<sup>27</sup> Athanasiou, Lia I., op. cit., p.77.

<sup>28</sup> i.e. by shipbrokers or by the Baltic Exchange, which publishes daily reports covering over 64 individual routes for tankers, bulk carriers and gas carriers and produces, in addition, seven indices based on freight assessment. See, Fearnley's Report, "Legal and Economic Analysis of Tramp Maritime Services", op. cit., para 86.

<sup>29</sup> "The Tramp Shipping Market", op. cit., p. 4.

<sup>30</sup> Fearnley's Report, "Legal and Economic Analysis of Tramp Maritime Services", op. cit., para. 121.

<sup>31</sup> "Notice on the definition of relevant market for the purposes of Community competition law", op. cit., p. 3, para. 13.

implementing the EC competition provisions under the previous regime. Finally, the different issues presented here should be kept in mind when defining the relevant market from a competition law point of view.

*B. High degree of dependence on the trade patterns.*

The tramp sector displays a high degree of dependence, upstream and downstream, between suppliers and customers. This dependence is mainly reflected on the geographical movement of the vessels, the fluctuation in prices and the evolution of the sector through time. As it was the case for the first general feature discussed, examination and understanding of this feature will later be useful for the market delineation.

Geographical movement of vessels and fluctuation in prices might be caused by a variety of reasons. For example, the production of some commodities, like agricultural<sup>32</sup> or forest products<sup>33</sup>, which account for a significant percentage of the sea trade, is affected not only by seasonal or climatic elements but also by other external factors, like physical catastrophes. As a result, this volatility of the demand side causes the need for modification of the supply side; hence time is necessary for the tramp market to adjust. During the adjustment period, vessels may need to move regionally or to switch from the transportation of one commodity to another. Thus, the possible disequilibrium created affects temporarily the freight rates, i.e. when the supply of transport space exceeds the demand; freight rates drop (and vice versa). The impact on prices by the changes in the demand side will stop when the sector reaches equilibrium again.

The above observation, that the tramp sector is vulnerable to trade alterations, leads to two valuable conclusions. Firstly, whilst defining the relevant market, it will not always be

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<sup>32</sup> This category of commodities includes products or raw materials of the agricultural industry, such as cereals, animal feedstuffs, sugar, molasses, refrigerated food, oil and fats and fertilizers, and accounts for 13% of sea trade. See “The Tramp Shipping Market”, op. cit., p. 9.

<sup>33</sup> This category of commodities includes primarily industrial materials used for the manufacture of paper, paperboard and in the construction industry, such as timber (logs and lumber) wood pulp, plywood, paper and various wood products. See “The Tramp Shipping Market”, op. cit., p.9.

clear whether an increase in price may result in a switch in cargo flow. Secondly, the assessment of a *prima facie* restrictive agreement should take into account the fact that the supply side cannot by definition act without considering the possible reaction of the demand.<sup>34</sup>

The dependence of the tramp sector to the demand side is also apparent from the evolution of the sector in time. In the post-War period, the world economy grew rapidly resulting in an increased demand of raw materials by the heavy industry. Under these conditions, the shipping industry had to adapt. This adaptation is mainly reflected in the size of the vessels. The last decades, vessels became significantly larger. For example, in the 1950s oil tankers had cargo capacity of less than 50,000 dwt. In the second half of the 1960s, the VLCC (Very Large Crude Carrier) had already emerged having a cargo capacity in excess of 200,000 dwt. Similar development was noticed in the dry bulk carriers.<sup>35</sup> This expansion in the vessels' size has led to more cost effective vessels, and to a proportional decrease in the transport cost per tone with the increase in vessel size. Thus, allowing economies of scale to be achieved.<sup>36</sup>

Apart from the general increase in vessels' size, another aspect of the shipping industry's efforts for adaptability to the client's needs is the specialization of the tramp sector. For example, the carriage of paper and pulp required special handling because both of these products were sensitive to humidity and physical impact. This resulted in the development of OHBC ("open hatch, box shaped bulk carrier") vessels, which were specially designed based on the special characteristics of those products.<sup>37</sup> That was also the case for other products and specialization was the sector's response to the customers' needs for safe, reliable and fast transport services. Furthermore, as it was already stated, under 2.1,

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<sup>34</sup> Athanasiou, Lia I., *op. cit.*, p. 79.

<sup>35</sup> Fearnley's Report, *op. cit.*, p. 30, para. 143.

<sup>36</sup> *Ibid.*, p. 30, paragraphs 141-142.

<sup>37</sup> *Ibid.*, p. 31, para. 146.

specialization in the tramp market led to the recognition that the tramp market segments should be reviewed.<sup>38</sup>

### 2.2.2 Tramp market segments

Another element that should be taken into account, before proceeding to the market definition, is the division of the tramp sector in various subsectors. This rather brief presentation might be of use in the delineation of the geographical market (i.e. when examining the range of ports served) and especially when considering the substitutability of the vessels used. It has to be stressed though, that the different segments do not constitute relevant markets themselves.

The tramp sector is traditionally divided into two main subsectors based on the nature of the cargo: the liquid bulk and the dry bulk. Recently, as already described above (under 2.1), the Commission identified<sup>39</sup> a third segment, known as "specialised transport" or often referred as "neo-bulk". These subsectors are further divided into different segments. More particularly, in liquid bulk one can identify the following segments: i) chemical, ii) clean petroleum products (CPP), iii) crude oil, iv) dirty petroleum products (DPP), v) liquefied natural gas (LNG) and iv) liquefied petroleum gas (LPG). Dry bulk sub-division is usually based on the vessel's size (i.e. Capesize, Panamax etc.). Finally, neo-bulk sector is further separated by reference either to the type of the vessel (Ro-Ro, OHBC etc.) or to the transported cargo (motor vehicles, liquid gases etc.).<sup>40</sup>

### 2.2.3 The relevant market under EC competition law

Market definition usually serves as a prerequisite to the calculation of market shares, in the sense that it could convey meaningful information regarding market power for the purposes of assessing dominance (under article 82 EC) or for the purposes of assessing the effects on

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<sup>38</sup> See the *TAA* Decision, op. cit.

<sup>39</sup> Ibid.

<sup>40</sup> Fearnley's Report, op. cit.

competition of an agreement (under article 81 EC).<sup>41</sup> However, because of the complexity of the market definition process, there is always a risk of error. For instance, a broad definition would result to a lower standard of competition law obligations for an undertaking that has indeed significant market power. Hence, delineating the relevant market should be regarded a means to an end and not an end itself.<sup>42</sup> In this section, an attempt is being made on how the general principles of market definition, as laid down in the Commission's "Notice on the definition of relevant market" and in relevant case law, under the light of the recently issued "Guidelines of the application of Article 81EC Treaty to maritime transport services", could apply to tramp transport services.

The method that it will be followed is the traditional two-stage analysis. At first, the criteria used for the identification of the boundaries between the different product markets will be discussed, specifically (i) demand substitutability, (ii) supply substitutability and (iii) potential competition.<sup>43</sup> Afterwards, the elements to be considered when defining the geographical market will be examined.

#### *A. Product market.*

##### *(i) Demand substitutability.*

Demand-side substitution exists when purchasers of a product would switch to readily available substitutes or to suppliers located elsewhere in response to a small change in relative prices.<sup>44</sup> Thus, there is mainly a question of a sufficient degree of interchangeability between products.<sup>45</sup> Products that have different characteristics and not the same intended use should comprise distinct product markets. It should be noted here that, in our case, as product is considered the transport service provided by tramp vessels.

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<sup>41</sup> "Notice on the definition of relevant market for the purposes of Community competition law", op. cit., p. 1, para. 2.

<sup>42</sup> Bellamy & Child, *European Community Law of Competition*, 6<sup>th</sup> ed., OUP, 2008, para. 4.001.

<sup>43</sup> "Notice on the definition of relevant market for the purposes of Community competition law", op. cit., p. 3, para. 13.

<sup>44</sup> Ibid. p. 4, para. 17.

<sup>45</sup> See Case 85/76 *Hoffmann - La Roche v Commission* [1979] ECR-461, para 28.



For the determination of the relevant product market from the demand side, the European Commission sets as a starting point the “main terms” of an individual transport request. The Commission’s rationale behind this suggestion is that the “main terms” generally identify the essential elements of the transport requirement at issue. For example, voyage charter’s essential elements are the cargo to be carried, the cargo volume, the loading and discharging ports, the laydays or the ultimate date by which the cargo has to arrive and technical details regarding the vessel. Negotiability or non-negotiability of one of the main terms will qualify for a wider or narrower definition of the market respectively.<sup>46</sup>

The Commission’s approach has been criticised.<sup>47</sup> The core of the criticism is focused on the chosen methodology. It was commented that the starting point of the analysis is fixed too late, presupposing that the cargo owner has already decided on how he will ship the commodity to its destination. However, the research into substitutes normally takes place at an earlier stage, when the customer examines which the available transport services are.

In my opinion, the chosen methodology, although the wording at this point is not clear, does not imply that the customer has already made his decision about the best way of shipping his cargo. The Guidelines refer to the “main terms” of an “*individual transport request*”. The word “*request*” indicates that the customer is indeed seeking for the best options among the available transport services. In that sense, the “main terms” reflect the customer’s needs. If, for instance, a cargo owner needs a certain type of vessel to ship his commodity but the vessel’s size is not significant for his choice, then the vessel’s size constitutes a negotiable element of the main terms. Thus, the relevant market is wider with respect to this specific element. Nevertheless, this is a point that requires clarification.

Another element proposed by the Commission when examining demand substitutability is the consideration of the transport contracts types (i.e. voyage charters, time charters,

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<sup>46</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 22.

<sup>47</sup> Athanasiou, Lia I., op. cit., p. 82-83.

contracts of affreightment etc.).<sup>48</sup> The different types of contracts entail differentiated rights and obligations for the contracting parties. The choice of the contract type is primarily an entrepreneurial decision. The customers, on one hand, monitor rates under different contract types and shift their business accordingly. Shipowners, on the other hand, will try to fix their vessels in the most favourable terms possible, assuring stability and effective freight rates. It is questionable whether and to which extent the different transport contracts can in practice affect the nature of the service provided, and, thus, demand substitutability. In a recent decision<sup>49</sup> (hereinafter the *APMM/BROSTRØM* Decision), the European Commission, when assessing the element of contract types for market definition purposes, found that there are no vessel availability issues when shifting business from one contract type to another. Moreover, the market investigation conducted by the Commission revealed that the majority of the operators uses at least three of the four possible contract types.<sup>50</sup> Therefore, there was no need for subdivision of the relevant market by contract types. However, consideration of the different transport contracts makes sense when examining the available capacity in certain tramp shipping markets. For example, vessels operating in more specialised trades tend to be fixed in longer term time charters.<sup>51</sup> As a result, they can be considered as captive capacity and should not be taken into account when assessing the relevant market on a case by case basis.<sup>52</sup>

Furthermore, the assessment of interchangeability between the different tramp vessel services requires an examination of the characteristics and the intended use of the ships. Thus, the types and sizes of the vessels, in connection to the nature of the commodity to be shipped, have to be considered. This requires obviously an ad hoc evaluation.

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<sup>48</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 23.

<sup>49</sup> Commission Decision of 14/01/2009 declaring a concentration to be compatible with the common market (Case No COMP/M.5346 - *APMM / BROSTRØM*) according to Council Regulation (EEC) No 139/2004, p. 6, para. 34.

<sup>50</sup> There are mainly four contract types in the tanker business (which was of concern for the market investigation): voyage charters (VCs), time charters (TCs), contracts of affreightment (CoAs), and consecutive voyage charters (CVs). Ibid., p. 6, para. 33.

<sup>51</sup> Fearnley’s Report, op. cit., p. 39, para. 193.

<sup>52</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 29.

Firstly, regarding the vessel types, it can be safely presumed that a liquid commodity for instance is not likely at all to be carried on dry bulk vessels; thus, there is no interchangeability between liquid bulk and dry bulk vessels. Things are not that simple in regards to some liquid cargoes that might be possible to be transported on different kinds of liquid bulk carriers. For example, crude oil, apart from being transported on crude oil tankers, is also transported on clean petroleum product tankers, combined carriers (which can carry ore, bauxite and crude oil) and on dirty petroleum product tankers.<sup>53</sup> However, substitutability between liquid bulk vessels for the carriage of chemicals is more complicated, depending mainly on the level of hazard of the transported chemical. In addition, when defining the vessel type to be included in the relevant market, the double-hull requirement for tankers in Community waters under Regulation 417/2002<sup>54</sup> shall be taken into account.<sup>55</sup>

Secondly, as far as the vessel sizes is concerned, it appears to be the industry's perception that vessel sizes constitute separate markets.<sup>56</sup> This can partly be explained by the fact that generally larger vessels are able to offer more competitive freight rates due to economies of scale.<sup>57</sup> Other reasons, for the market segmentation based on the size, are the flexibility of smaller vessels or the vessels' different levels of ability to sail in adverse weather due to their size. The European Commission seems to concur with the industry's view. The *APMM/BROSTRØM* investigation indicated that smaller vessels, on one hand, tend to be more flexible, because they can reach ports where there is low demand and ports with draught restrictions, and they allow customers to send small, regular shipments for just-in-

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<sup>53</sup> Fearnley's Report, op. cit., p. 294, para. 1272.

<sup>54</sup> Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, OJ L 64, 7.3.2002.

<sup>55</sup> See Commission Decision of 14/01/2009 declaring a concentration to be compatible with the common market (Case No COMP/M.5346 - *APMM / BROSTRØM*) according to Council Regulation (EEC) No 139/2004, p. 3, para. 14. See also, European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 30.

<sup>56</sup> See, Fearnley's Report, op. cit.

<sup>57</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 24.

time delivery, while large shipments require storage facilities. Larger vessels, on the other hand, are more fuel-efficient and cost-efficient (in terms of the cost of transport per ton of product, as loading one large cargo produces economies of scale). Finally, it appeared from the same investigation that smaller ships tend to focus on coastal/short-range trade, while larger ships tend to sail on long-haul routes. Moreover, most respondents to the market investigation consider that the 10,000 dwt limit is a generally accepted segmentation in the industry.<sup>58</sup> For the above reasons, the Commission concluded that vessels of less than 10,000 dwt belong to a separate relevant market from vessels within the 10,000-60,000 dwt range.

Another element that the European Commission sets out for consideration in its Maritime Guidelines is the existence of chains of substitution between vessel sizes in tramp shipping.<sup>59</sup> Vessel sizes at the extreme of certain tramp shipping markets are not directly substitutable but chain substitution effects may constrain pricing at the extremes, including those vessels in a broader market definition.<sup>60</sup> Despite the inclusion of that element in the Maritime Guidelines under the factors to be considered for the determination of the relevant product market, the Commission, in the *APMM/BROSTRØM* Decision, deemed that the chains of substitution between different vessel sizes are closely related to the geographic market definition. Thus, it examined the possible existence of chain substitution effects under the relevant section.<sup>61</sup>

To sum up, as it appears from the Maritime Guidelines and the *APMM/BROSTRØM* Decision, there is a variety of factors to be taken into account for the determination of the

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<sup>58</sup> Commission Decision of 14/01/2009 declaring a concentration to be compatible with the common market (Case No COMP/M.5346 - APMM / BROSTRØM) according to Council Regulation (EEC) No 139/2004, p. 5, para. 29.

<sup>59</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 28.

<sup>60</sup> See, for example, Case M. 2706 *Carnival Corporation/P&O Princess*, OJ 2003 L248/1, where the Commission was examining cruise services, and it concluded that premium and economy cruises belong in the same relevant market because of chain substitution effects.

<sup>61</sup> Commission Decision of 14/01/2009 declaring a concentration to be compatible with the common market (Case No COMP/M.5346 - APMM / BROSTRØM) according to Council Regulation (EEC) No 139/2004, p. 6, para. 32.

relevant product market from the demand side. In any event, it is necessary to assess demand substitutability on a case by case analysis because of the complexity of the sector and the wide range of the offered tramp vessel services.

*(ii) Supply substitutability.*

Supply-side substitutability exists where suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. Then the market may be broadened to include the products that those suppliers are already producing.<sup>62</sup> Supply-side substitution is an essential element for the definition of the product market,<sup>63</sup> and it is meaningful when its results for the market definition are equivalent to those of the demand substitution research in terms of effectiveness and immediacy. Therefore, the examination of supply substitutability may affirm or even expand the market as already defined if it demonstrates that the suppliers could offer different services immediately and without important costs; hence time and cost are relevant for our assessment.

The Maritime Guidelines set as a starting point for the determination of the relevant product market from the supply-side the technical and physical conditions of the cargo to be carried and the vessel type.<sup>64</sup> For example, many oil tankers are able to carry dirty and clean petroleum products. Switching though from a dirty product to a clean product requires not only time but might also entail significant costs. The *APMM/BROSTRØM* investigation indicated that the cost of cleaning (including the opportunity cost of not being able to use the vessel, unless the cleaning takes place during a ballast voyage) is significant when compared to the price of a typical voyage.<sup>65</sup> Apart from the cost and the necessary

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<sup>62</sup> “Notice on the definition of relevant market for the purposes of Community competition law”, op. cit., p. 5, para. 20.

<sup>63</sup> Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215.

<sup>64</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 25.

<sup>65</sup> Commission Decision of 14/01/2009 declaring a concentration to be compatible with the common market (Case No COMP/M.5346 - *APMM / BROSTRØM*) according to Council Regulation (EEC) No 139/2004, p. 4, para. 17.

time, the investigation pointed out a number of other factors that tanker operators consider before cleaning a vessel in response to a customer's request. In particular, they estimate the prospects of profitability of the “clean” market for a significant period in the future, and whether it is possible to clean the vessel to the degree of cleanliness required by the customer or whether the cleaning can take place before the loading date required by the customer.<sup>66</sup> However, the majority of the respondents to that investigation answered that the vessels transporting clean products are indeed substitutable with vessels transporting dirty products.<sup>67</sup> Thus, the relevant market from the supply-side will comprise more than one type of vessel, if vessels can be adjusted to transport a particular cargo at negligible cost and in a short time-frame making it possible for different tramp service providers to compete for the transport of this cargo.

Furthermore, it is stressed in the Maritime Guidelines<sup>68</sup> the fact that the providers of specialised services might be at a competitive disadvantage for the transportation of other cargo because specialised vessels are technically adapted to carry specific types of cargo. Finally, another element to be taken into account is the possible limitations (i.e. terminal and draught restrictions or environmental standards for particular vessel types in certain ports or regions) to the mobility of vessels, which could impede port calls in response to individual demand.<sup>69</sup>

*(iii) Potential competition.*

The third source of competitive constraint, potential competition, is not taken into account when defining markets.<sup>70</sup> This analysis is only carried out at a later stage as part of the substantive competitive assessment if potential rival suppliers do not pose a sufficiently close competitive constraint to be treated as part of the relevant market through supply-side

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<sup>66</sup> Ibid., p. 4, para. 18.

<sup>67</sup> Ibid., p. 4, para. 20.

<sup>68</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 26.

<sup>69</sup> Ibid., para. 27.

<sup>70</sup> “Notice on the definition of relevant market for the purposes of Community competition law”, op. cit., p. 6, para. 24.

substitution.<sup>71</sup> Supply-side substitution and potential competition are conceptually different issues but there is ‘overlap in part’ since both of them represent an effective competitive constraint related to the conditions of entry in the short-term and in the long-term respectively.<sup>72</sup> Because of that close relation to supply-side substitution dimension of the product market, potential competition, i.e. the potential barriers to entry in the tramp shipping market, will be discussed at this point.

The possible barriers, which a new player might face to entry the tramp market, are: a) capital, b) time, c) management and d) technological.<sup>73</sup>

a) Capital barriers: Despite the large assets required for the acquisition of a ship, the active financing market effectively mitigates the capital cost barrier to entry in the tramp market. There are various financial institutions that are engaged in the financing of shipping companies, such as commercial banks, export credit agencies, investments banks, private equity houses and finance lessors.<sup>74</sup>

b) Time barriers: There are two possible ways to enter the shipping market, either by ordering a shipyard to build a vessel or by seeking the desired vessel type in the second hand market. The first option might delay the entrance for several years. However, a more immediate entrance in the tramp market can be achieved by following the second option since the second hand market for buying ships is generally active. Therefore, time barriers are generally easy to be overcome.

c) Management barriers: Becoming a major player requires a lot more than simply buying a ship. Usually, one needs further organization to operate in more industrialized market segments, for example IT systems, human resources, customer relations etc.<sup>75</sup> These days, management barriers are not that essential, as investors can operate as pure tonnage

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<sup>71</sup> Bellamy & Child, op. cit., p. 271, para. 4.054.

<sup>72</sup> Case T-191/98 *Atlantic Container Line v Commission* [2003] ECR II-3275.

<sup>73</sup> Fearnley’s Report, op. cit., p. 27, para. 121.

<sup>74</sup> Ibid., p. 60, para. 283.

<sup>75</sup> Ibid., p. 28, para. 128.

providers to the major shipping companies in the various segments without having any organization or special systems.<sup>76</sup>

d) Technological barriers: Finally, “know-how” is necessary when an investor wishes to get involved in more sophisticated sectors like the chemical segment, but once again these barriers are significantly mitigated by the way the tramp sector operates.

### *B. Geographic market.*

According to the European Commission’s Notice of relevant market, the relevant geographic market “*comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*”.<sup>77</sup> The procedure for the determination of the geographic market is again based on an analysis of the demand characteristics,<sup>78</sup> and further, if necessary, of the supply factors.<sup>79</sup>

A proposed starting point in the Maritime Guidelines is to consider the geographic elements that are usually contained in the transport requirements, i.e. the loading and discharging ports or regions. These ports can provide a first orientation for the delineation of the relevant geographic market from the demand-side, but without any prejudice to the final definition of the relevant geographic market,<sup>80</sup> because other vessels, which operate in different areas, may easily shift their business if the freight rates make it economical for them to do so.

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<sup>76</sup> Ibid.

<sup>77</sup> “Notice on the definition of relevant market for the purposes of Community competition law”, op. cit., p. 2, para. 8.

<sup>78</sup> Ibid., p. 7, para. 29.

<sup>79</sup> Ibid., p. 7, para. 30.

<sup>80</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 31.



In the *APMM/BROSTRØM* investigation, the notifying party submitted that in tanker business the geographic scope of the market is worldwide. Its analysis was based on allegedly high correlation rates between spot prices on routes in different regions. Alternatively, the notifying party proposed a distinction between tankers trading “West of Suez” and tankers trading “East of Suez”.<sup>81</sup> In addition, the market investigation showed that in the event of a 5-10% increase in price in a neighbouring area, a quarter of the respondents would not move their vessels there, while another quarter would, and around a half replied “only on certain conditions”.<sup>82</sup> Unfortunately, the Commission did not reach any conclusion regarding the relevant geographic market, as there were no competition concerns on any possible market definition.<sup>83</sup> As a result, it is not clear at the present moment which criteria will be of significance for the Commission when determining the relevant geographic market for the purposes of a competition case related to the tramp sector. However, it could be safely assumed from the notifying party’s submissions and the conducted market investigation that the tramp shipping sector is an open market characterised generally by geographical substitutability.

Finally, it is noted in the Maritime Guidelines<sup>84</sup> that certain geographic markets may be defined on a directional basis or may occur only temporarily because, for example, climatic conditions or harvest periods periodically affect the demand for transport of particular cargos. In this context, repositioning of vessels, ballast voyages and trade imbalances should be considered for the delineation of relevant geographic markets.

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<sup>81</sup> Commission Decision of 14/01/2009 declaring a concentration to be compatible with the common market (Case No COMP/M.5346 - *APMM / BROSTRØM*) according to Council Regulation (EEC) No 139/2004, p. 7, para. 36.

<sup>82</sup> *Ibid.*, p. 7, para. 37.

<sup>83</sup> *Ibid.*, p. 7, para. 39.

<sup>84</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, *op. cit.*, para. 32.

### **3. HORIZONTAL AGREEMENTS IN THE TRAMP SHIPPING SECTOR UNDER ARTICLE 81 EC.**

#### **3.1 Pool agreements in tramp shipping.**

According to the information provided by the Maritime Guidelines<sup>85</sup> and other studies,<sup>86</sup> the principal form of horizontal cooperation between carriers in the tramp sector is the shipping pool. A shipping pool is a collection of similar vessel types under various ownerships, placed under the care of an administration. This administration markets the vessels as a single, cohesive fleet unit and collects – ‘pools’ – their earnings, which, in due course, are distributed to individual owners under a pre-arranged ‘weighing’ system, by which each entered vessel should receive its fair share.<sup>87</sup> The reasons for creating a shipping pool and their common features will be discussed in the following paragraphs.

Pool agreements are a form of commercial cooperation between shipowners aiming primarily at a more efficient fleet deployment and spread of the risks. For example, compliance with the time and cargo volume restrictions of a contract of affreightment (CoA) might require capacity (physical or managerial) that small to medium-sized shipowners or operators do not have in order to bid for such business alone or, if they do, they may feel that the risks involved may be higher than what they would normally be prepared to accept.<sup>88</sup> Thus, an obvious commercial solution would be the establishment of a pool with other shipowners or operators with similar vessels because a bigger fleet can react quicker and more effectively to the market’s demand, achieving the required capacity to be able to spread its services among CoAs and subsequent voyage charters in a more

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<sup>85</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, OJ C 245, 26.9.2008, p. 2, para. 60.

<sup>86</sup> See EU Report COMP/2006/D2/002 “Legal and Economic Analysis of Tramp Maritime Services”, prepared by Fearnley Consultants AS., 2007.

<sup>87</sup> Definition of shipping pools as given by Packard, W.V., *Shipping Pools* 2<sup>nd</sup> ed., Lloyd’s of London Press Ltd, 1995, p. 3.

<sup>88</sup> Haralambides, H.E., *The economics of bulk shipping pools*, extract from *Maritime Policy & Management*, 23(3): 221-237, 1996, p. 225.

coordinated and hence cost effective and efficient manner.<sup>89</sup> In this way, ballast legs will be minimized, and as a result higher rate of utilization of each vessel will secure stable incomes for the pool members. Furthermore, achievement of a strong marketing position, high image and better financing possibilities have been indicated, among others, as incentives for creating a pool.<sup>90</sup>

Shipping pools are formed by individually negotiated contracts, the pooling agreements, which often incorporate a master charterparty (normally a time charter form of common use).<sup>91</sup> There is no universal model for a pool but a variety of different pooling structures exist. It is however possible to identify a number of similar features between the different pooling agreements. These common characteristics can be categorised<sup>92</sup> as follows:

(i) *Similar tonnage*: As it was explained above, one of the main reasons for creating a pool is to attract large contracts of affreightment. Thus, the appropriate solution is to pool together the same or similar vessel types in order the pool to be able to offer full flexibility and to be able to substitute vessels where and when it is necessary. As a result, pools are usually specialised in certain product markets. In addition, similar tonnage facilitates the distribution of revenues and voyage costs between the vessels.

(ii) *Central administration and joint marketing*: In the majority of the pools, a Pool Management Company (hereinafter PMC) markets the fleet as a single, cohesive entity, offering in that way transport solutions regardless of whose ship performs the actual voyage. The PMC, which can be either a separate company (administration controlled pools) or one of the pool members (member-controlled pools),<sup>93</sup> is responsible for the

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<sup>89</sup> Lorenzon, F., and Nazzini, R., *Setting Sail on a Sea of Doubt: Tramp Shipping Pools, Competition Law and the Noble Quest for Certainty*, in *Competition and Regulation in Shipping and Shipping Related Industries*, Martinus Nijhoff Publishers, Leiden – Boston, 2009, p. 96.

<sup>90</sup> Haralambides, H.E., op. cit., p. 224.

<sup>91</sup> Lorenzon, F., and Nazzini, R., op. cit., p. 97.

<sup>92</sup> The categorisation is based on Haralambides, H.E., op.cit., p. 221 et seq, and on Fearnley's Report, op. cit., p. 245 et seq.

<sup>93</sup> This distinction was originally proposed by Packard, W.V., op. cit., p. 6, and was followed by Haralambides, H.E., op. cit., p. 222.

commercial management (i.e. joint marketing and negotiation of freight rates)<sup>94</sup> and commercial operation (for example, planning vessel movements and instructing vessels, nominating agents in ports etc)<sup>95</sup> of the pool. Ship financing matters, manning and the technical management of the vessels lie at the shipowners' part. Another important task that the PMC performs, apart from marketing the vessels, is to collect the freights and distribute the revenues.

(iii) *Negotiation of freight or charter rates*: The PMC, acting on behalf of the shipowners and in conformity with the shipowners' agreed operating instructions for the pool, is responsible for negotiating the freight rates and fixing the vessels on agreed terms and conditions. This feature enhances the view of the pool as a single entity.

(iv) *Centralisation of incomes and voyage costs*: The PMC will usually collect the freights and will eventually distribute the net result to the members of the pool, after deducting its commission and all voyage costs incurred. The allocation of the revenues is being carried out according to a complex weighing system integrated in the pool agreement.

Before proceeding to a more detailed analysis of pool agreements under the light of the EC competition law rules, it is useful to mention at this point some features of these agreements that are of significance from a competition law point of view. First, the fact that pool agreements' key feature is the joint marketing and chartering out of the participants' vessels. Secondly, any possible non-compete clauses<sup>96</sup> prohibiting pool members from being active in the same market outside the pool. Thirdly, the notice periods contained in the exit clauses, which regulate the right of the participants to withdraw their vessels.<sup>97</sup> Fourthly, provisions of the agreements related to the lay-up of vessels.<sup>98</sup> Finally, clauses regarding the exchange of sensitive technological and commercial information.

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<sup>94</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 61.

<sup>95</sup> Ibid.

<sup>96</sup> Røsæg, Erik, *Organisational Maritime Law*, 1993, p. 99.

<sup>97</sup> Packard, W.V., op. cit., p. 122.

<sup>98</sup> Ibid., p. 113.

### 3.2 Assessment of pool agreements under Article 81(1) EC.

In the following paragraphs, tramp shipping pools under Article 81(1) EC will be examined. The assessment will mainly take into consideration the Maritime Guidelines, the Commission's "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements"<sup>99</sup> (hereinafter the Horizontal Guidelines) and relevant case law.

#### 3.2.1 Pool agreements that do not fall under Article 81(1) EC.

There are certain types of pool agreements that by their very nature do not infringe Article 81(1) EC. The European Commission, being in line with the Horizontal Guidelines,<sup>100</sup> states in its Maritime Guidelines<sup>101</sup> that if the participants to a pool are not actual or potential competitors, then this pool agreement does not fall under the prohibition of Article 81(1) EC. Such a situation is unlikely to be met in the majority of the pools. As presented under 3.1, for reasons of efficiency, pools usually have fleet consisting of vessels of similar type and size, and consequently the owners of the vessels can be deemed to operate in the same product market.

It might be the case however that the undertakings participating in a pool are not able to provide the services covered by the pool independently. For example, when two or more shipowners set up a shipping pool for the purpose of tendering for and performing contracts of affreightment for which as individual operators they could not bid successfully or which they could not carry on their own.<sup>102</sup> Therefore, a pool agreement concluded on these grounds will not infringe Article 81(1) EC,<sup>103</sup> even if such pools occasionally carry other

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<sup>99</sup> European Commission, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", OJ C 3, 6.1.2001, p. 2.

<sup>100</sup> Ibid., para. 24.

<sup>101</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 64.

<sup>102</sup> Ibid.

<sup>103</sup> European Commission, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", op. cit., para. 24.

cargo representing a small part of the overall volume.<sup>104</sup> In practice, cases where a shipowner would not be able to operate his vessels without participating in a pool are rare. Membership of a pool is not usually a necessity but a vehicle for the owners to achieve greater efficiency and to minimise commercial risks. Nonetheless, agreements involving small shipowners, who need to obtain finance on the commercial market and are required by their banks or whoever is financing their vessels to enter into pools,<sup>105</sup> might qualify as pool agreements that by their nature will fall outside Article 81(1) EC.

Finally, pools are not caught by Article 81(1) EC if their activity does not influence the relevant parameters of competition<sup>106</sup> because they are of minor importance<sup>107</sup> and/or do not appreciably affect trade between Member States.<sup>108</sup> This follows from the application of the *de minimis* doctrine which was first formulated by the ECJ in the *Volk v Vervaecke*<sup>109</sup> case. The *de minimis* doctrine, using a series of quantitative criteria, basically reflects the acknowledgment that undertakings with market share below certain thresholds or small and medium-sized undertakings are rarely capable of appreciably affect trade between Member States.<sup>110</sup> That being said, it could be considered as a ‘safe harbour’<sup>111</sup> for agreements below certain thresholds.<sup>112</sup> However in some circumstances an agreement might be still held to fall within Article 81(1) EC<sup>113</sup> even if it is below the quantitative standards as set out by the Commission in its “Notice on agreements of minor importance”

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<sup>104</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 64.

<sup>105</sup> Fearnley’s Report, op. cit., p. 331.

<sup>106</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 65, and European Commission, “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements”, op. cit., para. 24.

<sup>107</sup> European Commission, “Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty”, OJ C 368, 22.12.2001, p. 13.

<sup>108</sup> European Commission, “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty”, OJ C 101, 27.4.2004, p. 81.

<sup>109</sup> Case 5/69, *Franz Volk v S.P.R.L. Ets J. Vervaecke* [1969] ECR 295.

<sup>110</sup> European Commission, “Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty”, op. cit., paragraphs 2 and 3.

<sup>111</sup> Whish, Richard, *Competition Law* 6<sup>th</sup> ed., Oxford University Press, 2009, p. 139.

<sup>112</sup> European Commission, “Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty”, op. cit., para. 7.

<sup>113</sup> See, for example, Case 19/77, *Miller International Schallplatten GmbH v Commission* [1978] ECR 131, where Miller’s market share was assessed around 5% but nevertheless the agreement was found to infringe Article 81(1) EC.

(hereinafter the De Minimis Notice); and reversely, an agreement may be found not to have an appreciable effect on competition even where the thresholds in the De Minimis Notice are exceeded. Moreover, the de minimis doctrine does not provide a “safe harbour” for agreements containing any of the hardcore restrictions,<sup>114</sup> namely (i) the fixing of prices when selling the products to third parties,<sup>115</sup> (ii) the limitation of output or sales, and (iii) the allocation of markets or customers.<sup>116</sup> Therefore, in the case of tramp shipping pools the de minimis doctrine is unlikely to apply, despite the fact that many of the pool agreements<sup>117</sup> do not represent significant market shares, because joint marketing of the vessels entails joint determination of the freight rates.

### 3.2.2 Pool agreements that generally fall under Article 81(1) EC.

Pool agreements between competitors that have the object to restrict competition by means of price fixing, output limitations or sharing of markets or customers are generally presumed to fall under Article 81(1) EC.<sup>118</sup> The European Commission identifies a type of agreements, the commercialisation agreements between competitors, that will almost always be caught by the prohibition of Article 81(1) EC.<sup>119</sup> These are defined as agreements involving “*cooperation between competitors in the selling, distribution or promotion of their products*”.<sup>120</sup> The principal competition concern about a

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<sup>114</sup> European Commission, “Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty”, op. cit., para. 11.

<sup>115</sup> See, for example, *Greek Ferry Services Cartel* OJ L 109/24 [1999], where the Commission imposed fines on Marlines and Ventouris (both of them were Small- and Medium –sized Enterprises according to the earlier De Minimis Notice of 1997), because they were party to price fixing agreements. The Commission Decision was upheld on appeal Cases T-56/99 etc, *Marlines SA v Commission* [2003] ECR II-5225.

<sup>116</sup> See, joined cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services Ltd and others v Commission* [1998] ECR II-3141, where the Court refers to the same restrictions as examples of agreements that have as their object the distortion of competition. The De Minimis Notice (para. 1) applies however to agreements that have as their object the restriction of competition. Thus, it can be presumed the de minimis doctrine might be of use for agreements involving restrictions to competition other than the so called “hardcore”.

<sup>117</sup> According to the findings of Fearnley’s Report, op. cit.

<sup>118</sup> European Commission, “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements”, op. cit., para. 25.

<sup>119</sup> Ibid., para. 144.

<sup>120</sup> Ibid., para. 139.

commercialisation agreement between competitors is price fixing, which is inherent to joint selling, since, according to the Horizontal Guidelines, joint selling comprises the “*joint determination of all commercial aspects related to the sale of the product including price*”.<sup>121</sup> Thus, in the case of tramp shipping pools, one has to examine if they are limited to joint selling in order to count as commercialisation agreements that almost always fall under Article 81(1) EC.

At this point, it is important to stress that not all agreements involving joint selling features are caught by Article 81(1) EC. The European Commission acknowledges that production joint ventures should be treated differently because “*It is inherent to the functioning of such a joint venture that decisions on output are taken jointly by the parties. If the joint venture also markets the jointly manufactured goods, then decisions on prices need to be taken jointly by the parties to such an agreement. In this case, the inclusion of provisions on prices or output does not automatically cause the agreement to fall under Article 81(1). The provisions on prices or output will have to be assessed together with the other effects of the joint venture on the market to determine the applicability of Article 81(1)*”.<sup>122</sup> Therefore, Article 81(1) EC is not always to be applied to a production joint venture that also performs the distribution of the manufactured products and sets the sales prices for these products, provided that the price fixing by the joint venture is the effect of integrating the various functions.<sup>123</sup> That being said, it is critical from a competition law point of view to examine whether and to which extent tramp shipping pools could be deemed to encompass characteristics of a production joint venture.

The Horizontal Guidelines are not clear on how the concept of joint production should be construed when it comes to the provision of services. It is stated however, that they apply to agreements concerning both goods and services, collectively referred to as ‘products’;<sup>124</sup> hence, it can be assumed that the guidance regarding joint production can apply mutatis

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<sup>121</sup> Ibid.

<sup>122</sup> Ibid., footnote 18.

<sup>123</sup> Ibid., para. 90.

<sup>124</sup> Ibid., para. 13.



mutandis to arrangements between service providers for the joint provision of services. Pooled tramp vessel services will be considered to involve joint production elements if it can be found some integration of the means of provision of the services separately from their joint commercialisation or marketing.

The situation in the standard shipping pools (as they were presented under 3.1) could be, in an analogy with the production and sale of goods, described as follows. The pooled vessels could be considered as an input made by the shipowners for the production of an integrated set of transport services provided to each customer. Thus, the pooled vessels are in that way similar to what raw materials are for the manufacture of goods. The pool manager, responsible for the commercial management and operation of the pooled vessels, has those joint functions integrated under his control, in the same way as production and sale of goods might be integrated in a single factory.<sup>125</sup> Therefore, following obviously a rather simplified approach, it could be assumed that generally, in standard shipping pools, joint selling is coupled with features of joint production. The European Commission, aware of this fact, sets it for consideration in its Maritime Guidelines.<sup>126</sup>

In any event, given the variation in pools' characteristics, each pool must be analysed on a case by case basis. How each tramp pool agreement will be finally treated under EC competition rules depends on where its centre of gravity lies. For the determination of the centre of gravity, two factors should be taken into account: first, the starting point of the cooperation, and, secondly, the degree of integration of the different functions which are being combined.<sup>127</sup> Therefore, if the centre of gravity of a pool agreement is joint selling, it will count as a commercialisation agreement, and consequently it will almost always fall within the prohibition of Article 81(1) EC. If, on the other hand, the centre of gravity is joint production, then any price fixing arrangement will not be assessed separately, but the overall effects of the production joint venture on the market must be considered in order to

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<sup>125</sup> Fearnley's Report, op. cit., para 1513.

<sup>126</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 62.

<sup>127</sup> European Commission, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", op. cit., para. 12.

determine the applicability of Article 81(1) EC.

It should be noted here that a production agreement with integrated distribution will often in fact account for a full-function joint venture.<sup>128</sup> This will be the case for tramp shipping pools, which are created as a joint venture performing on a lasting basis all the functions of an autonomous economic entity and meets the thresholds set by Council Regulation (EC) No 139/2004 (the EC Merger Regulation).<sup>129</sup> To the extent that the creation of such pools has as its object or effect the coordination of the competitive behaviour of their parents, the coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) EC with a view to establishing whether or not the operation is compatible with the common market.<sup>130</sup>

### 3.2.3 Pool agreements that may fall under Article 81(1) EC.

Pool agreements, which do not belong in any of the abovementioned categories, need further analysis in order to conclude whether they fall within the scope of the Article 81(1) EC prohibition. In the following paragraphs, different factors, on which pool's ability to cause negative effects on competition depends, will be discussed.

#### *A. Economic context and market's structural factors.*

If a pool does not have as its object a restriction of competition, then its effects in the market shall be appraised.<sup>131</sup> For a pool agreement to be restrictive by effect, it must affect actual or potential competition<sup>132</sup> to such an extent that on the relevant market negative

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<sup>128</sup> Ibid., footnote 41.

<sup>129</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p.1.

<sup>130</sup> Ibid., Article 2(4), and European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 63.

<sup>131</sup> Ibid., para. 67.

<sup>132</sup> See Case C-7/95 P, *John Deere Ltd v Commission*, [1998] ECR I-3111, para. 77, where it is stated that Article 81(1) "does not restrict such an assessment to actual effects alone; it must also take account of the agreement's potential effects on competition within the common market".

effects on prices, costs, innovation, service differentiation and service quality can be expected with a reasonable degree of probability.<sup>133</sup> The negative effects must be appreciable; otherwise the prohibition rule of Article 81(1) does not apply.<sup>134</sup> Pools can have these effects by appreciably reducing rivalry between the parties to the pool agreement or between them and third parties.<sup>135</sup>

A pool's capacity to cause such appreciable negative effects depends on the economic context. The analysis of the economic context is necessary in order to determine the competition which would have occurred in the absence of the pool agreement in dispute.<sup>136</sup> The correct determination of what the position would be without the pool agreement in question is critical to a proper assessment of the effect of the agreement. Such an analysis should take into account the pool members' combined power,<sup>137</sup> and to which extent the members' behaviour in neighbouring markets, which are closely related to the market directly affected by the cooperation, might be influenced.<sup>138</sup> The European Commission in its Maritime Guidelines gives as an example the case where the pool's market is that for the transport of forest products in specialized box shaped vessels (market A) and the pool's members also operate ships in the dry bulk market (market B). Here, it should be examined what would be the position of the pool members in those markets in the absence of the pool agreement.

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<sup>133</sup> See Case T-112/99, *Métropole télévision (M6) and others v Commission* [2001] ECR II-2459, para. 76, where the Court states that "it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 81(1) of the Treaty. In assessing the applicability of Article 81(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned".

<sup>134</sup> See Case 5/69, *Franz Völk v S.P.R.L. Ets J. Vervaecke*, op. cit., para. 7, where the Court states that "an agreement falls outside the prohibition in Article 81 when it has only an insignificant effect on the markets".

<sup>135</sup> European Commission, "Guidelines on the application of Article 81(3) of the Treaty", OJ C 101, 27.4.2004, p.97, para. 16.

<sup>136</sup> See Case 56/65, *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, where the Court states that "The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute".

<sup>137</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 69.

<sup>138</sup> European Commission, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", op. cit., para. 142.

Furthermore, the grade of impact that a pool may have on the relevant market is highly related to a number of structural factors of the market where the specific pool operates.<sup>139</sup> For example, multi-membership (a pool shares members with other pools) in pools may raise coordination concerns.<sup>140</sup> More specifically, a member in two or more pools, operating in the same or related markets, will be able to coordinate its behaviour in such a way that those pools' conduct will be influenced and coordinated to its own interests. Therefore, it is important to examine if the participant shipowners in a shipping pool are also members in other pools because this fact may obviously has restrictive effects on competition. In that case, the assessment of the pool's market power should take in consideration the market shares of any other pool with which it has a common member in order to reach more realistic results.

Other structural factors in the relevant market to be taken into account when assessing a pool's ability to cause appreciable negative market effects are:<sup>141</sup> the market concentration, the position and number of competitors, the stability of market shares over time, market entry barriers and the likelihood of entry (see 2.2.3.A (iii) *potential competition*, where an account of the possible barriers to entry the tramp shipping market was provided), market transparency (see 2.2.1.A), countervailing buying power of transport users (see 2.2.1.B, where it was stressed that the tramp shipping market is in large extent demand-driven) and the nature of the services (i.e. homogeneous versus differentiated services).

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<sup>139</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 70.

<sup>140</sup> See Commission Decision of 14 July 1986 in Case IV/30.320 - *Optical Fibres*, OJ L 236/30, 22.8.1986, para. 45, where the Commission recognises that "The restrictions and distortions of competition resulting from the agreements arise from the parallel existence of functionally similar joint ventures in which [a member] participates actively."

<sup>141</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 70.

### *B. Nature of the pool agreement.*

Apart from the relevant market's structural factors, consideration should be given to the nature of the agreement for the evaluation of a tramp shipping pool's effect on competition.<sup>142</sup> There are different features in a pool agreement that might raise competition law concerns, i.e. (i) non-compete clauses, (ii) lock-in periods and exit clauses, and (iii) the exchange of commercially sensitive information.

(i) *Non-compete clauses*: The majority of pool agreements usually contain some kind of non-compete clauses.<sup>143</sup> Although the exact wording among the different agreements varies, the common denominator is a clear restriction on the pool members from engaging vessels of the same type, as those committed to the pool, in the same market as the pool. In order to determine whether or not such clauses come within the prohibition of Article 81(1) EC, it is necessary to examine what would be the state of competition if those clauses did not exist.<sup>144</sup> The rationale behind the incorporation of a non-compete clause in a pool agreement is merely the fact that the members can acquire knowledge, which could be used to the detriment of the purpose of the agreement. Nevertheless, the duration and scope of such clauses must be strictly limited to the attainment of that purpose, otherwise they cannot be held as having a beneficial effect on competition.<sup>145</sup>

(ii) *Lock-in periods and exit clauses*: In addition, pool agreements usually include clauses related to lock-in periods and notice periods. Lock-in period is called the predetermined amount of time during which a member is not allowed to leave the pool. Notice periods are contained in the exit clauses and regulate the right of the participants to withdraw their vessels. Contractual restrictions related to the participant's right to withdraw from the pool raise concerns for possible negative effects on potential competition. An undertaking's obligation to stay in the pool for a certain period of time might constitute an effective

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<sup>142</sup> Ibid., para. 71.

<sup>143</sup> According to the findings of Fearnley's Report, op. cit.

<sup>144</sup> See, Case 42/84, *Remia BV and others v Commission* [1985] ECR 2545, para. 18.

<sup>145</sup> Ibid., para. 20.

competitive constraint for them to move their pooled vessels to a better market. Therefore, as it is the case for the non-compete clauses, lock-in periods and notice periods should be regulated in such a way that their duration is not likely to cause negative effects on competition.

(iii) *The exchange of commercially sensitive information*: The existence of a tramp shipping pool can obviously facilitate the exchange of information between its members. The exchange of information is likely to be caught by the prohibition of Article 81(1) EC if it comprises commercially sensitive data relating to the parameters of competition, such as price, capacity or costs.<sup>146</sup> The appraisal of information as commercially sensitive should take into account a number of criteria. Firstly, information published in the public domain does not in principle constitute an infringement of Article 81(1) EC.<sup>147</sup> Higher accessibility to the data improves the level of market transparency. However, publicly available information combined with other information may result to commercially sensitive information, whose exchange is potentially restrictive of competition.<sup>148</sup> Secondly, the exchange of individual or aggregated information, which enables the identification of individual undertakings, is also possible to infringe Article 81(1) EC.<sup>149</sup> Thirdly, the age of the data exchanged is also an important factor. Information, which was more than year old, has been considered historic<sup>150</sup> whereas information less than one year old has been viewed as recent.<sup>151</sup> The exchange of future data is particularly likely to be problematic, especially

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<sup>146</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 50.

<sup>147</sup> See Cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB and Others v Commission* [2003] ECR II-3275, para. 1154. See also Case C-7/95 P, *John Deere Ltd v Commission*, op. cit., paragraphs 89,90.

<sup>148</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 51.

<sup>149</sup> See Commission Decision of 23 December 1977 in Case IV/29.176 – *Vegetable Parchment*, OJ L 70/54, 13.3.1978 for the exchange of individual information. See also Case 40-48/73, *“Suiker Unie” UA and others v Commission* [1975] ECR-1663 for the exchange of aggregated information.

<sup>150</sup> See Commission Decision of 17 February 1992 in Case IV/36.370 – *UK Agricultural Tractor Registration Exchange*, OJ L 68/19, 13.3.1992, para. 50, where the Commission considers “that an annual exchange of one-year-old sales figures of individual competitors [...] can be accepted as commercial data with no appreciable distorting effect on competition between the manufacturers or between the dealers operating on [...] market”.

<sup>151</sup> See Commission Decision of 26 November 1997 in Case IV/36.069 - *Wirtschaftsvereinigung Stahl*, OJ L 1/10, 3.1.1998, para. 17.

when it relates to prices or output, because it may reveal the commercial strategy an undertaking intends to adopt in the market.<sup>152</sup> In that case, it may appreciably reduce rivalry between the parties to the exchange and is thus potentially restrictive of competition. Finally, the more frequent the information is exchanged, the more swiftly competitors can react. This facilitates retaliation and ultimately lowers the incentives to initiate competitive actions on the market; as a consequence the so-called ‘hidden competition’ could be restricted.<sup>153</sup>

It is useful to be noted at this point that one should consider ‘commercial ancillarity’ when assessing contractual restrictions contained in a pool agreement. ‘Commercial ancillarity’ reflects the acknowledgement that some restrictive provisions of an agreement might be necessary in order to enable the parties to achieve a legitimate commercial purpose,<sup>154</sup> i.e. the penetration of a new market,<sup>155</sup> the sale of a business<sup>156</sup> or the successful establishment of a group purchasing association.<sup>157</sup> Therefore, if it is successfully proved that a restrictive clause is ancillary to a legitimate commercial operation, then the agreement will fall outside Article 81(1) EC. In the case of tramp shipping pools, ancillarity is unlikely to be found between any contractual restrictions and the pool agreement since joint selling of transport services, which is the main function of tramp pools, does not qualify as a legitimate commercial purpose.<sup>158</sup>

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<sup>152</sup> See Case C-199/92 P, *Hüls AG v Commission* [1999] ECR I- I-4287, paragraphs 141 et. seq.

<sup>153</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 55.

<sup>154</sup> Whish, op. cit. p.126.

<sup>155</sup> Ibid.

<sup>156</sup> See Case 42/84, *Remia BV and others v Commission* [1985] ECR-2545.

<sup>157</sup> See Case C-250/92, *Gøttrup-Klim Grovvareforeninger v Dansk Landbrugs Grovvarereselskab AmbA* [1994] ECR I-5641.

<sup>158</sup> European Commission, “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements”, op. cit., para. 144.

### *C. Joint purchasing.*

Some tramp shipping pools do not involve joint selling but nevertheless entail some degree of coordination on the parameters of competition, e.g. joint purchasing.<sup>159</sup> As element of joint purchasing in pools can be regarded the PMC's responsibility for payment of the voyage related costs (bunker costs, port charges etc.). The reasons for the centralization of purchasing are related to cost efficiencies due to the pool's increased bargaining power. An agreement on joint purchasing does not by its nature fall within Article 81(1) EC.<sup>160</sup> However, joint buying may have restrictive effects on the relevant purchasing market, and on the downstream selling market where the participants in the agreement are active as sellers.<sup>161</sup> Regarding the relevant purchasing market, significant buying power by a group of customers may lead the suppliers of that market to recover the price reductions for one group by increasing their prices for other customers and/or by reducing quality and lessening innovation efforts.<sup>162</sup> In addition, increased buying power may foreclose competing buyers by limiting their access to efficient suppliers.<sup>163</sup> In the case of the downstream selling market, a joint purchasing agreement is deemed to have anti-competitive effects if cost savings do not pass on to consumers but the agreement is primarily used as a vehicle for the parties to use their combined power for coordinating their behaviour as sellers.<sup>164</sup> In order for the abovementioned negative market effects to take place, it is necessary the parties to the agreement to have some significant degree of market power.<sup>165</sup> Practically, this is very unlikely to be the case for the tramp shipping pools since fuels or port services for instance are products required by the entire shipping industry.

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<sup>159</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", op. cit., para. 68.

<sup>160</sup> European Commission, "Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements", op. cit., para. 124.

<sup>161</sup> Ibid., para. 119.

<sup>162</sup> Ibid., para. 126.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid., para. 128.

<sup>165</sup> Ibid., paragraphs 130 and 131, where no absolute threshold is suggested by the Commission. It is noticed however that in most cases it is unlikely that market power exists if the parties to the agreement have a combined market share of below 15 % either on the purchasing or the selling market.



### 3.3 Applicability of Article 81(3) EC.

A pool agreement that is found to infringe Article 81(1) EC is not necessarily unlawful. It can be exempted from the Article 81(1) prohibition if it satisfies all<sup>166</sup> the four conditions laid down in Article 81(3) EC. These four cumulative conditions are:

- i) the arrangement concerned must contribute to improving the production or distribution of the goods or services in question, or to promoting technical or economic progress;
- ii) consumers must be allowed a fair share of the resulting benefit;
- iii) the agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- iv) and finally, it must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

It is important to be stressed that there are no anti-competitive agreements which could never satisfy the above conditions;<sup>167</sup> as a consequence, there are no agreements that are ‘per se’ illegal in the EC system.<sup>168</sup> Even agreements restricting competition by object are capable of fulfilling the four cumulative conditions.<sup>169</sup> However, the greater the restriction of competition found under Article 81(1) EC, the greater the efficiencies and the pass-on to consumers must be. In any event, it is upon the undertakings defending the agreement the

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<sup>166</sup> It has been repeatedly stressed by the Community Courts that an agreement must fulfill all four of the conditions in order to benefit from 81(1) EC. See for example Joined Cases 43/82 and 63/82 *VBVB and VVVB v Commission* [1984] ECR-19, para. 61, and Case C-238/05, *Asnex-Equifax v Asociación de Usuarios de Servicios Bacarios (Ausbanc)* [2006] ECR I-11125, para 65.

<sup>167</sup> See Case T-17/93, *Matra Hachette SA v Commission* [1994] ECR II-595, para. 85, where the CFI considers “that in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 85(3) of the Treaty are satisfied and the practice in question has been properly notified to the Commission”, see also Joined Cases 56/64 and 58/64, *Consten and Grundig v Commission* [1966] ECR-299, pages 342, 343 and 347; and Case T-168/01, *GlaxoSmithKline Services Ltd v Commission* [2006] ECR II-2969, para. 233.

<sup>168</sup> Whish, op. cit., p.150.

<sup>169</sup> See Commission Decision of 7 April 2004 in Case COMP/A.38284/D2 - *Société Air France/Alitalia Linee Aeree Italiane SpA*, OJ L 362/17, 09/12/2004, where the Commission granted an individual exemption to an agreement being restrictive of competition by object.

burden of proving that the arrangement in question satisfies Article 81(3) EC.<sup>170</sup> Moreover, after the implementation of Council Regulation 1/2003 ('the Modernisation Regulation'),<sup>171</sup> the parties to an agreement are required to conduct their own 'self assessment' of the application of Article 81(1) EC.

In the following paragraphs, a possible application of each of the four criteria set out in Article 81(3) to tramp shipping pools will be examined. The assessment will take into account the Maritime Guidelines, the Commission's "Guidelines on the application of Article 81(3) of the Treaty"<sup>172</sup> and relevant case law. It should be noted here that the third condition of indispensability of the restrictions will be discussed before the second condition regarding fair share of benefits to consumers because considerations of whether consumers would obtain a fair share of any resulting benefit does not arise in the event that an agreement fails the indispensability test.<sup>173</sup>

### 3.3.1 Efficiency gains.

The undertakings participating in a pool agreement have to demonstrate that the pool produces the benefits listed in Article 81(3), i.e. it improves the transport services or it promotes technical or economic progress. Any benefit produced by a tramp shipping pool must be something of objective value to the Community as a whole, not a private benefit to the pool members themselves;<sup>174</sup> the generated efficiencies cannot be cost savings that are an inherent part of the reduction of competition but must result from the integration of economic activities. For methodological reasons, the different types of efficiencies listed in

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<sup>170</sup> See Joined Cases 56/64 and 58/64, *Consten and Grundig v Commission*, op. cit., p. 347, Joined Cases C-204/00 P, *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, para. 79.

<sup>171</sup> OJ L 1/1, 4.1.2003, "Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty", with which the system of notification of agreements to the Commission and the grant of individual exemption was abolished with effect from 1 May 2004.

<sup>172</sup> European Commission, "Guidelines on the application of Article 81(3) of the Treaty", OJ C 101, 27.4.2004, p.97.

<sup>173</sup> Ibid., para. 89.

<sup>174</sup> See Joined Cases 56/64 and 58/64, *Consten and Grundig v Commission*, op. cit., p. 348. See also Case T-65/98, *Van den Bergh Foods Ltd v Commission* [2003] ECR II-4653, para. 139.

Article 81(3) EC can be divided into cost efficiencies and efficiencies of a qualitative nature.<sup>175</sup>

*A. Cost efficiencies.*

The factors allowing tramp shipping pools to generate cost efficiencies are: (i) the increased capacity utilisation and output, (ii) economies of scale and (iii) economies of scope.

(i) *Increased capacity utilisation and output*: A pool has available a larger fleet than pool members would have independently, and thus, it is able for a more rational fleet utilisation since a reduction in the number of ballast voyages can be achieved by spreading the fleet geographically. In addition, due to synergies resulting from an integration of the pool members' assets, the shipowners participating in the pool may be able to attain a cost/output configuration that would not otherwise be possible.<sup>176</sup> Therefore, pool members can save costs and provide higher quality of services without having to acquire more vessels.

(ii) *Economies of scale*: Cost efficiencies may also result from economies of scale, i.e. declining cost per unit of output as output increases.<sup>177</sup> A tramp shipping pool might achieve economies of scale through various ways. First, a pool will have stronger negotiating power when purchasing goods or services necessary for its operation; hence, the cost of the provided transport services will be decreased. Secondly, cost savings can be attained by the centralisation of management and sharing of human resources. For example, a single individual member of staff can efficiently manage up to ten vessels at any time, dealing with all the chartering arrangements and contract negotiations. As a consequence, a shipowner, who trades his vessels individually, will need a fleet consisting of at least ten

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<sup>175</sup> European Commission, "Guidelines on the application of Article 81(3) of the Treaty", op. cit., para. 59.

<sup>176</sup> Ibid, para. 65.

<sup>177</sup> Ibid, para. 66.

vessels in order to fully employ an employee.<sup>178</sup> Thirdly, shipowners can share through pools costs related to the training of the crew and personnel.

In many cases the existence of economies of scale is a demand-driven need. For instance, in the tanker markets charterers enjoy considerable market strength. As a result, owners with a limited number of vessels would not be able to survive in those markets if they decided to trade individually.<sup>179</sup>

(iii) *Economies of scope*: Economies of scope are another source of cost efficiency. Economies of scope occur when pools achieve cost savings by providing different services on the basis of the same input.<sup>180</sup> Pools, by comprising more vessels, are able to offer different types of transport contracts, and thus, they can meet more efficiently their customers' individual demands. More specifically, if a pool's fleet consists of vessels of different types and sizes, then it is able to offer a wider scope of services to its clients. Furthermore, some pools enter into long-term agreements with terminals in all major ports or invest in their own terminals and storage facilities making them available for the benefit of their customers.<sup>181</sup>

#### *B. Efficiencies of a qualitative nature.*

Pools may also generate efficiencies of a qualitative nature, e.g. technical and technological advances or improvements in the distribution chain. For example, due to economies of scale afforded by the pools, investment in more sophisticated IT systems is possible. Such systems allow the shippers, consignees and pool members to monitor continuously the voyage and to have updated itineraries and documentation relating to their cargo.<sup>182</sup> In addition, pools may facilitate investments in the building of more technologically advanced vessels. This is of significance particularly in the trade of products where expensive and

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<sup>178</sup> Fearnley's Report, op. cit., para. 1597.

<sup>179</sup> Ibid., para. 1596.

<sup>180</sup> European Commission, "Guidelines on the application of Article 81(3) of the Treaty", op. cit., para. 67.

<sup>181</sup> Fearnley's Report, op. cit., para. 1600.

<sup>182</sup> Ibid., op. cit., para. 1612.

specialised vessels are required, such as chemical tankers, reeferships or OHBCs. Finally, investments made by the pool in port facilities improve the quality of the provided transport services as a whole since these facilities are usually available not only to the pooled vessels but to vessels outside the pool as well.

### 3.3.2 Indispensability of the restrictions.

A pool agreement must not impose restrictions on its parties, which are not indispensable to the attainment of the abovementioned efficiencies. The indispensability condition implies a two-fold test. First, it should be considered whether the pool agreement itself is necessary in order to achieve the efficiencies; and secondly, whether individual restrictions flowing from the pool agreement are reasonably necessary for the attainment of the efficiencies.<sup>183</sup>

#### *A. The efficiencies must be specific to the agreement.*

The first part of the two-fold test requires that the efficiencies are specific to the pool agreement, in the sense that there are no other economically practicable and less restrictive means of achieving the efficiencies. It should be examined, for example, whether the parties could have achieved the efficiencies on their own.<sup>184</sup>

As it has been mentioned under 3.1, the key feature of standard shipping pools is joint selling. Indispensability of the pool agreement should be viewed especially in connection with the price fixing elements<sup>185</sup> resulting from the integration of the joint sales function. In most pools, the PMC is responsible for the commercial and operational management, i.e., among others, the deployment of vessels and negotiation of freight rates. This enables the pool to achieve cost savings due to economies of scale or scope. It is hardly to be

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<sup>183</sup> European Commission, “Guidelines on the application of Article 81(3) of the Treaty”, op. cit., para. 73.

<sup>184</sup> European Commission, “Guidelines on the application of Article 81EC Treaty to maritime transport services”, op. cit., para. 76.

<sup>185</sup> European Commission, “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements”, op. cit., para. 154.

understood how these efficiencies would be attained if the PMC were deprived of the price fixing functions. Internal price competition would likely decrease pool's flexibility to deploy the pooled vessels in a more rational way, and thus compete more efficiently with other operators outside it. In addition, it will be more difficult for the pool to reach economies of scale or scope since it will not be able to maximise the revenue earning potential of the fleet without integrated commercial functions. In any event, the assessment of whether the undertakings participating in the pool could have attained the same efficiencies on their own should consider, *inter alia*, what is the minimum efficient scale to provide the various types of services in tramp shipping.<sup>186</sup> To estimate the minimum efficient scale, one has to determine the level of output required to minimize average cost and exhaust economies of scale. The larger the minimum efficient scale compared to each pool member's size, the more likely it is that the efficiencies will be deemed to be specific to the pool agreement.<sup>187</sup> Moreover, pool agreements can be presumed to be necessary for the attainment of the efficiencies because they produce synergies through the combination of the parties' assets.<sup>188</sup>

*B. The indispensability of individual restrictions.*

The second part of the two-fold test requires that the individual restrictions flowing from the pool agreement are indispensable. The pool members have to prove that both the nature and the intensity of any agreement are reasonably necessary to produce the claimed efficiencies.<sup>189</sup> A restriction will be deemed indispensable if its absence would eliminate or significantly reduce the efficiencies that follow from the agreement or make it significantly less likely that they will materialise.<sup>190</sup> The more restrictive a restraint is, the stricter the indispensability test will be.<sup>191</sup>

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<sup>186</sup> European Commission, "Guidelines on the application of Article 81EC Treaty to maritime transport services", *op. cit.*, para. 76.

<sup>187</sup> European Commission, "Guidelines on the application of Article 81(3) of the Treaty", *op. cit.*, para. 76.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*, para. 78.

<sup>190</sup> *Ibid.*, para. 79.

<sup>191</sup> *Ibid.* See Case T-86/95, *Compagnie Générale Maritime and others v Commission* [2002] ECR II-1011, paragraphs 162 et seq.

The most common restriction contained in the pool agreements is the non-compete clause (see 3.2.3.B). It is questionable whether a non-compete clause is indispensable to the attainment of the efficiencies. It can be argued that non-compete restrictions contribute to the cohesion of the pool's fleet; hence the pool is able to achieve the cost efficiencies described earlier. However, this argument is of relevance for those non-compete clauses that simply do not permit a shipowner to use his/her pooled vessel outside the pool because in such case PMC's available capacity will be uncertain and its flexibility in performing transport contracts reduced. Non-compete clauses, which cover activities other than those in which the pool trades or extend to vessels trading in different areas, are highly unlikely to pass the indispensability test. Another aspect that should be taken into account is the fact that non-compete clauses might actually have pro-competitive effects in the sense that they can prevent the risk of coordination between apparently independent undertakings and the pools in which they are members. The assessment of a non-compete clause's indispensability has also to consider the length of the restriction. Generally, in my opinion, non-compete restrictions are not likely to be found indispensable to the efficiencies; and if they are, their length should be limited to a period that allows the pool to establish itself in the market.

Another common restriction is the notice periods contained in the exit clauses (see 3.2.3.B). Notice periods usually range from six to twelve months both for withdrawal of vessels from the pool and withdrawal from the pool as a whole.<sup>192</sup> Notice periods secure the PMC's ability to enter into long term transport contracts by preventing sudden withdrawals. In addition, notice periods allow the pool to plan its investment policy and thus to achieve the qualitative efficiencies mentioned under 3.3.1.B. Even notice periods longer than twelve months can be found indispensable if the pool agreement demonstrates high degree of integration; for instance, a pool member makes significant investments based on the fact that the rest of the participants in the pool will contribute or remain in the pool for a longer

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<sup>192</sup> According to the findings of Fearnley's Report, *op. cit.*

period. Therefore, it can be assumed that notice periods are indispensable to the attainment of the efficiencies in relation to the extent of integration that a pool has.

### 3.3.3 Fair share of benefits to consumers.

The consumers must receive a fair share of the benefits generated by the pool agreement. The term “consumers” should be deemed to encompass direct users (both natural persons and undertakings) of the maritime transport services, i.e. shippers, cargo owners and generally charterers, and indirect users as well, i.e. the final consumers in the supply chain.<sup>193</sup> As a “fair share” would amount a pass-on of benefits to consumers that at least compensates them for any actual or likely negative impact caused to them by the restriction of competition found under Article 81(1) EC. The net effect of the pool agreement on the consumers must at least be neutral.<sup>194</sup> Moreover, it is the beneficial effects on all consumers in the relevant market that must be considered, and not the effect on each individual consumer.<sup>195</sup>

The cost efficiencies, as described above under 3.3.1, produced by the pool could accrue a fair share to consumers in various ways. First, the economies of scale and scope allow the pool to offer customers a variety of services and hence to meet each individual transport demand more effectively. Secondly, a pool has greater availability of vessels and increased capacity; thus, it can perform more complicated journeys and satisfy owners that have large cargo volumes. Thirdly, centralisation of administration and joint purchasing of the products needed to carry out voyages reduce the cost of the provided services, as a result a lowering of freight rates is possible. Qualitative benefits are more likely to be passed-on to

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<sup>193</sup> European Commission, “Guidelines on the application of Article 81(3) of the Treaty”, op. cit., para. 84.

<sup>194</sup> Ibid., para. 85. See also Joined Cases 56/64 and 58/64, *Consten and Grundig v Commission*, op. cit., p. 348, where the Court states that an improvement “must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition”.

<sup>195</sup> Case C-238/05, *Asnex-Equifax v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, op. cit., para. 70, where the Court states that “it is the beneficial nature of the effect on all consumers in the relevant markets that must be taken into consideration, not the effect on each member of that category of consumers”.



consumers. As it was mentioned earlier (under 3.3.1), investments in IT systems allow shippers to have better control over their cargo. In addition, pools can offer higher quality of services by investing in technologically advanced vessels and port facilities. In certain cases, qualitative benefits can be more significant even than price reductions for customers that transport high value commodities, and consequently, look for stability, security and reliability in transport services.

#### 3.3.4 No elimination of competition.

The fourth condition of Article 81(3) EC requires that the pool agreement does not afford its parties the possibility of eliminating competition in a substantial part of the market. In examining whether the fourth condition applies, one should consider the various sources of competition in the tramp shipping market, the level of competitive constraint that they impose on the parties to the pool agreement and the impact of the agreement on this competitive constraint. Both actual and potential competition must be taken into account when making this assessment.<sup>196</sup>

The degree of actual competition in the market should not be assessed solely on the basis of market shares. What also matters is the capacity of actual competitors to compete.<sup>197</sup> In the case of tramp shipping pools, the evidence<sup>198</sup> indicated that they were not able to use their joint resources and combined market power to raise prices in substantial parts of the market. Pool's ability to cause any distortions is significantly mitigated by the structure of the tramp shipping sector (see for details 2.2.1, where the high competitiveness of the sector and its dependence on the trade patterns were described). However, it might be the case that pools operating in more specialised segments of the market (e.g. LNG or

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<sup>196</sup> European Commission, "Guidelines on the application of Article 81(3) of the Treaty", op. cit., para. 108.

<sup>197</sup> Ibid., para. 109.

<sup>198</sup> See Fearnley's Report, op. cit., para. 1676.

chemicals) take advantage of their expertise and power in that specific market and use them to the detriment of competition.

The assessment of entry barriers should take into account a number of factors,<sup>199</sup> such as the cost of entry including sunk costs, the minimum efficient scale within the industry, the competitive strengths of potential entrants and the position of buyers. Generally, tramp shipping market is deemed to have low entry barriers (see 2.2.3.A.(iii) *potential competition*).

### 3.4 The block exemption for specialisation agreements: Regulation 2658/00.<sup>200</sup>

As it was explained under 3.2.2, a pool might amount as production joint venture if its centre of gravity lies on joint production. In that case, it has to be considered if the pool agreement benefits from the Specialisation Block Exemption.<sup>201</sup> The block exception applies on condition that the combined market share cap of participating undertakings does not exceed 20 per cent of the relevant market.<sup>202</sup> Furthermore, the exemption extends to purchasing and marketing agreements contained in the joint production agreement.<sup>203</sup> Agreements incorporating any of the hardcore restrictions, namely (a) the fixing of prices when selling the products to third parties; (b) the limitation of output or sales; and (c) the allocation of markets or customers,<sup>204</sup> will be excluded from the block exemption. Nevertheless, the block exemption will still found to be applicable either in the case that the parties set the capacity and production volume of the production joint venture, or in the case that the parties set sales targets and the fix the prices that a production joint venture

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<sup>199</sup> European Commission, “Guidelines on the application of Article 81(3) of the Treaty”, op. cit., para. 115.

<sup>200</sup> Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialisation agreements [2000] OJ L 304/3.

<sup>201</sup> See Article 1(1)(c), Commission Regulation 2658/2000, op. cit., where it is stated that the term ‘specialisation agreement’ covers “joint production agreements, by virtue of which two or more parties agree to produce certain products jointly”.

<sup>202</sup> See Article 4, Commission Regulation 2658/2000, op. cit. See further Article 6 for the rules on how to apply the market share threshold.

<sup>203</sup> See Article 3, Commission Regulation 2658/2000, op. cit.

<sup>204</sup> See Article 5(1), Commission Regulation 2658/2000, op. cit.

charges to its immediate customers.<sup>205</sup> The Specialisation Block Exemption will expire on 31 December 2010.<sup>206</sup>

Due to the limits of this paper, a detailed analysis of a potential application of the Specialisation Block Exemption to tramp shipping pools is not possible. However, taking into account that in any event each pool must be assessed on a case-by-case basis, a few remarks, which should be considered when assessing the application of Specialisation Block Exemption, will be enumerated. First, according to Article 2(4) of the Reg. 2658/00, the term ‘product’ means “*a good and/or a service, including both intermediary goods and/or services and final goods and/or services, with the exception of distribution and rental services*”; in the context of transport service providers in tramp shipping, it is not clear if the provision of services by a pool should be considered as distribution of services that a shipowner provides to the PMC, and thus, not be encompassed by the term ‘product’. Secondly, according to Article 1(1)(c), the term ‘specialisation agreement’ covers “*joint production agreements, by virtue of which two or more parties agree to produce certain products jointly*”; here, it should be examined whether pool agreement specifies explicitly which services the pool intends to provide. Thirdly, according to Article 1(2), the block exemption “*shall also apply to provisions contained in specialisation agreements, which do not constitute the primary object of such agreements, but are directly related to and necessary for their implementation*”; hence, in order for a pool agreement to be covered by the block exemption, it should not contain any restrictive provisions that are not indispensable for its implementation.

It is obvious that if a pool agreement is found to be covered by the Specialisation Block Exemption, then a number of features of a tramp shipping pool that raise anti-competitive concerns could be ‘justified’. For example, the pool members could fix prices to be charged to their immediate customers<sup>207</sup> or agree on the output of the pool.<sup>208</sup>

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<sup>205</sup> See Article 5(2), Commission Regulation 2658/2000, op. cit.

<sup>206</sup> See Article 9, Commission Regulation 2658/2000, op. cit.

<sup>207</sup> See Article 5(2)(b), Commission Regulation 2658/2000, op. cit.

<sup>208</sup> See Article 5(2)(a), Commission Regulation 2658/2000, op. cit.

#### 4. CONCLUSIONS

The implementation of Regulation 1419/2006 marked the beginning of a new era for the whole tramp shipping sector. From now on tramp shipping industry will be treated as any other industry under the EC competition rules. Naturally, this fact raises a variety of issues regarding the application of those rules to a sector that has never been systematically investigated by the European (both Community and national) competition authorities. This paper attempted to deal with those issues and the following concluding remarks could be made.

First, the characterisation of a transport service as a tramp vessel service does not preclude anymore the implementation of the EC competition rules. Nevertheless, it reveals that the special features of the tramp shipping sector (e.g. its international dimension, the volatility of the demand side, the segmentation of the sector etc.) should be considered when delineating the relevant market for competition law purposes.

Secondly, the principal form of cooperation between carriers in the tramp sector is the shipping pool. Generally, a pool agreement, depending on where its centre of gravity lies, might count either as commercialisation agreement if its key feature is joint selling, or as production agreement if the parties agree to jointly produce certain services. In order to determine the centre of gravity, one should examine the starting point of the cooperation and the degree of integration of the different functions which are being combined. This point is critical since the treatment of a pool agreement under competition law will be differentiated according to its characterisation as commercialisation or production agreement.

Thirdly, a pool agreement that amounts as a commercialisation agreement is most likely to be found to infringe Article 81(1) EC unless its parties are not actual or potential competitors, which rarely might be the case, or would not otherwise be able to provide the

services covered by the pool independently. Pools limited to joint selling will be deemed to have as their object the restriction of competition, and thus, will always fall within the prohibition of Article 81(1) EC. These pools will be caught by Article 81(1) EC even if their market shares are below the thresholds set by the De Minimis Notice because joint selling entails price fixing, which is considered hardcore restriction excluding the application of the de minimis doctrine. However, the possibilities that the competition authorities would initiate proceedings against pools with insignificant market shares are limited. As a consequence, it will be necessary to examine whether a pool qualifies for an exemption pursuant to Article 81(3) EC. Generally, tramp shipping pools seem to fulfill the four cumulative conditions of Article 81(3) EC since they produce gain efficiencies (i.e. increased capacity utilisation and output, economies of scale/scope and qualitative benefits) that accrue a fair share to consumers (e.g. increased quality and variety of transport services and potential lowering in prices); their restrictive provisions, depending on how intensive they are, could be considered indispensable to the attainment of these efficiencies; and in most cases they are not found to be capable of eliminating competition in substantial parts of the market.

Fourthly, a pool that counts as a production joint venture will be assessed under different terms. Price fixing elements of the pool agreement should be viewed as a necessary consequence of the integration of capacity for the provision of transport services. Hence, an analysis of its effects on competition in the relevant market is required in order to conclude whether or not the pool falls within Article 81(1) EC. Moreover, it has to be examined if the pool could benefit from the Specialisation Block Exemption. In my opinion, it is not unlikely at all tramp shipping pools to be covered by this block exemption.

Fifthly, a tramp shipping pool with high degree of integration that performs on a lasting basis all the functions of an autonomous economic entity and meets the thresholds of Regulation 139/2004 will in fact account for a full-function joint venture.

Given the fact that there are no per se illegal agreements in the EC competition law system, the undertakings have to perform their own 'self assessment' of their practices. This might lead the 'players' of the tramp sector to reconsider its structure and reform the organisation of their activities. For example, it is likely that undertakings choose to integrate their functions to a higher degree creating in that way more independent entities. In any event, legal certainty will be achieved as soon as there is a ruling by the European Courts.

## 5. SOURCES

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